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In the Supreme Court of the United States

OCTOBER TERM, 1976

W. DALTON LA RUE, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. xl-xli) and the district court (Pet. App. xxxvi-xxxviii) are not officially reported. The opinion of the Interior Board of Land Appeals (Pet. App. xxiii-xxxv) is reported at 9 IBLA 208.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1976, and a timely petition for rehearing was denied on April 21, 1976. The petition for a writ of certiorari was filed on July 15, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below correctly affirmed the Interior Board of Land Appeals' decision that a stock

fence separating federal grazing allotments should not be relocated because its present location allows full satisfaction of petitioners' grazing entitlement.

2. Whether the court of appeals correctly declined to consider petitioners' claim, raised for the first time on appeal, that officials of the Bureau of Land Management aided and abetted a violation of 18 U.S.C. 1001 allegedly committed by petitioners' neighbors.

3. Whether the courts below correctly dismissed petitioners' claim against the United States for damages allegedly resulting from their reliance upon erroneous information supplied by employees of the Bureau of Land Management.

STATEMENT

Petitioners and the intervenor-respondents (the Matleys) own neighboring ranches in Winnemucca Valley, Nevada (Pet. App. xiii). Both ranches are "base properties" qualified for Class 1 grazing privileges on the federal range under the Taylor Grazing Act, 48 Stat. 1269, as amended, 43 U.S.C. 315 *et seq.* (*ibid.*).[1] On

[1]"Base property" is defined as "property used for the support of the livestock for which a grazing privilege is sought and on the basis of which the extent of a license or permit is computed." 43 C.F.R. 4110.0-5(j).

"Class 1" grazing privileges are granted in recognition of "land dependent by use," defined as "forage land other than Federal range of such character that the conduct of an economic livestock operation requires the use of the Federal range in connection with it and which, in the 'priority period' [5-year period immediately preceding June 28, 1934, or immediately preceding the date of the order adding land to a grazing district], was used as a part of an established, permanent, and continuing livestock operation for any two consecutive years or for any three years of such priority period in connection with substantially the same part of the public domain." 43 C.F.R. 4110.0-5(m)(1), 4111.2-1(b).

August 28, 1958, petitioners' predecessor in interest, Elmor Hill, entered into a cooperative agreement with the Matleys under Section 4 of the Taylor Grazing Act, 43 U.S.C. 315c, for the construction of a stock fence separating their grazing allotments (Pet. App. xiii-xiv). The fence was completed in May 1959 and accepted by the Matleys, Hill, and the Bureau of Land Management (BLM) as the boundary line between the two grazing allotments (Pet. App. xiv). The BLM failed to update its records, however, and continued to issue grazing licenses that contained metes and bounds descriptions of petitioners' allotment at variance with the actual fence line (Pet. App. xv-xvi).

When petitioners discovered the discrepancy, they asked BLM to require removal of the fence to the boundary described in the grazing licenses, approximately one mile to the east of the actual fence line. By a decision dated December 24, 1969, the BLM district manager reaffirmed that the fence line, as presently located, comprised the east boundary of petitioners' allotment, finding (a) that the fenced allotment fully satisfied petitioners' Class 1 base property qualifications and (b) that acceptance of the fence as the eastern boundary line by petitioners' predecessors barred readjudication under Department regulations (Pet. App. vi-vii).[2]

[2]43 C.F.R. 4115.2-1(e)(13)(i) provides:

> No readjudication of any license or permit * * * will be made on the claim of any applicant or intervenor with respect to the qualifications of the base property, or as to the livestock numbers or seasons of use of the Federal range allotment where such qualifications or such allotment has been recognized and license or permit has issued for a period of three consecutive years or more, immediately preceding such claim.

Petitioners appealed the district manager's decision, contending that the location of the fence was induced by the Matleys' fraud upon petitioners' predecessor. The district manager's decision was affirmed both by a hearing examiner (Pet. App. viii-xxii) and by the Interior Board of Land Appeals (Pet. App. xxiii-xxxv).[3] The hearing examiner and the IBLA agreed that the erroneous boundary description contained in petitioners' grazing license afforded no basis for relief because petitioners' allotment, as now fenced, provides sufficient forage to satisfy their authorized grazing use, a fact that petitioners have never disputed. As to petitioners' allegation of fraud, the IBLA stated (Pet. App. xxxiv-xxxv):

> This department is seriously concerned by allegations of fraud associated with its apportionment of federal range land. Were it possible to conclude from the evidence in this case that a fraud had been perpetrated and, in consequence, the appellants had been deprived of a privilege to which they are entitled, this Board would act to set matters aright. But where it is established that the line is located so as to give both parties full satisfaction of their respective entitlements, as is the case here, the impetus for its location is not germane to the question of whether it should be moved. In short, we will not destroy an equitable and just apportionment of federal range in

[3]The authority of the Secretary of the Interior to act upon appeals from subordinate departmental officials relating to the use and disposition of public lands and their resources is delegated to the Interior Board of Land Appeals by Regulation 43 C.F.R. 4.1(3). Thus, a final decision by the IBLA constitutes the final agency action in a matter.

Throughout this brief "secretary" and "IBLA" are used interchangeably in referring to action taken by the IBLA.

> favor of some less desirable division simply because of the dubious origins of the present line. If the fence had not been built and the events associated with its construction had not occurred, the evidence indicates that it would still have been necessary to relocate the old metes and bounds division line to the approximate position of the present fence line, as the previous division line afforded appellants forage in excess of their Class I qualifications.

Petitioners then instituted this action to review the decision of the IBLA.[4] The district court granted the defendants' motion for summary judgment, holding that the IBLA decision was not arbitrary or capricious. The court of appeals, in a *per curiam* memorandum, affirmed.

ARGUMENT

The court of appeals' decision is correct, does not conflict with the decision of any other court of appeals, and does not present questions warranting review by this Court.

1. The IBLA's decision rests on two well-established principles embodied in the Taylor Grazing Act. First, a grazing licensee has no legal right to any particular area of the federal range, 43 U.S.C. 315b; the only basis upon which an allotment of federal range lands may

[4]The district court apparently concluded that the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, conferred jurisdiction over this case (Pet. App. xxxvii). For the reasons stated in our brief in *Mathews* v. *Sanders*, No. 75-1443, we do not believe that the Administrative Procedure Act contains an independent grant of jurisdiction. Moreover, even if jurisdiction under the Act were generally recognized, this case, as the district court found (Pet. App. xxxvii), involves "agency action committed to agency discretion by law." Review of such action is specifically precluded by the Administrative Procedure Act, 5 U.S.C. 701(a)(2).

be challenged is that it is incapable of satisfying the allottee's authorized grazing use. *Thomas Ormachea and Michael P. Casey*, 73 I.D. 339; *Harold Babcock, et al.*, A-30301 (June 16, 1965) (unpublished), affirmed *sub nom. Babcock, et al.* v. *Udall*, Civil No. 1-66-87 (S. D. Idaho, 1969). Second, a grazing licensee or permittee may not seek to readjudicate his license or permit, with respect to base property qualifications, livestock numbers, or seasons of use, when such qualifications or allotment have been recognized by the issuance of a license or permit for three consecutive years or more. 43 C.F.R. 4115.2-1 (e)(13)(i); *Malvin Pedroli, et al.*, 75 I.D. 63.

Petitioners do not, indeed could not, dispute that their allotment as presently recognized by the BLM contains sufficient forage to satisfy their Class 1 base property qualifications. Moreover, the existing fence for many years was recognized as the dividing line between the two allotments. Thus, the IBLA correctly concluded that petitioners were barred on two grounds from asserting a claim of right to additional grazing privileges that would be gained from movement of the fence.[5]

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[5]The outcome of this case does not depend, therefore, on petitioners' contention (Pet. 37-40) that the ban against readjudications is inapplicable because there was no formal adjudication of the fence line. Only the district manager and the hearing examiner placed reliance on 43 C.F.R. 4115.2-1(e)(13)(i) and then only as an alternative ground of decision. Each found that, apart from the readjudication problem, there was no basis for relocating the fence because petitioners already enjoyed all the grazing privileges to which they are entitled. The IBLA, which rendered the final administrative decision, agreed with petitioners that "the three-year limit is of secondary importance in that the BLM has the right to exercise its discretionary power to modify existing allotments even after a licensee has lost his right to do so * * *" (Pet. App. xxxiii). The IBLA concluded, however, that there was no reason for BLM to exercise its discretionary authority since petitioners had not been injured. Thus, despite the references to 43 C.F.R. 4115.2-1(e)(13)(i), it is clear that petitioners were not denied relief solely because of the statute of limitations but rather because, after full consideration on the merits, the IBLA found that they were not entitled to additional grazing privileges.

Petitioners' allegation of fraud, as the IBLA held, does not require disregard of these principles.[6] Injury is an essential element of remediable fraud, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254; and fraud without damage is not actionable, *Commodity Credit Corp.* v. *Rosenberg Bros. & Co.*, 243 F. 2d 504, 512 (C.A. 9). Here petitioners' predecessor yielded no grazing privileges to which he would otherwise have been entitled and the Matleys obtained no additional grazing privileges. Indeed, petitioners apparently concede that their allotment, as presently fenced, fully satisfies their Class 1 grazing entitlement. Thus, the IBLA's decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

2. Petitioners' contention that the BLM district manager and the Matleys violated 18 U.S.C. 2 and 1001, respectively, was not raised in the district court and was not considered by the court of appeals. *Katsev* v. *Coleman*, 530 F. 2d 176 (C.A. 8); *Michael-Regan Co., Inc.* v. *Lindell*, 527 F. 2d 653 (C.A. 9); *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F. 2d 826 (C.A. 5). In any event, mere allegations about criminal behavior do not alter the critical fact, discussed above, that petitioners already have all the Class 1 forage to which they are entitled.

3. In their amended complaint, petitioners added a second cause of action for damages against the United States. The amended complaint alleged that petitioners

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[6]Although they do not discuss the issue in their petition, petitioners suggest in Question 5 (Pet. 3) that the lower courts erred in denying them a trial *de novo*. The Administrative Procedure Act does not permit a trial *de novo* of administrative decisions of the type involved here. See, *e.g.*, *United States* v. *Consolidated Mines & Smelting Co., Ltd.*, 455 F. 2d 432 (C.A. 9); *Coleman* v. *United States*, 363 F. 2d 190 (C.A. 9), reversed on other grounds, 390 U.S. 599; *Adams* v. *United States*, 318 F. 2d 861 (C.A. 9); *Dredge Corp.* v. *Penny*, 338 F. 2d 456, 462 (C.A. 9); *Henrikson* v. *Udall*, 350 F. 2d 949, 950 (C.A. 9).

had been injured by their reliance upon erroneous information supplied by employees of the BLM. The courts below correctly held, however, that the claim was barred by 28 U.S.C. 2680(h), which exempts claims for the tort of misrepresentation from coverage under the Federal Tort Claims Act.[7] The gravemen of the complaint here is that employees of the BLM supplied "incorrect information," on which petitioners relied to their detriment. This cause of action falls within the misrepresentation exception of Section 2680(h).[8] See, *e.g.*, *United States* v. *Nuestadt*, 366 U.S. 696; *Hall* v. *United States*, 274 F. 2d 69 (C.A. 10).

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[7]Although the courts below did not address this issue, we believe petitioners' failure to file an administrative claim, as required by 28 U.S.C. 2675(a), is a jurisdictional defect which cannot be waived. See *Best Bearings Co.* v. *United States*, 463 F. 2d 1177, 1179 (C.A. 7); *Peterson* v. *United States*, 428 F. 2d 368 (C.A. 8); *Meeker* v. *United States*, 435 F. 2d 1219 (C.A. 8). Petitioners' failure to file an administrative claim means that their cause of action is barred by the statute of limitations. 28 U.S.C. 2401(b).

[8]Petitioners attempt to avoid the barrier of Section 2680(h) by alleging that the BLM, in addition to making misrepresentations, negligently performed "other tasks and duties," citing *United Air Lines, Inc.* v. *Wiener*, 335 F. 2d 379, 398 (C.A. 9). In *United Airlines* the court held that an action based upon the failure of a government employee to advise properly an airplane pilot about air traffic conditions was not barred by Section 2680(h), since, in addition to the misrepresentation involved, the government was also guilty of negligent performance of "operational tasks." Petitioners' complaint in this case, however, is not comparable to the unique situations presented by the flight information cases. See *Matthews* v. *United States*, 456 F. 2d 395, 398 (C.A. 5); *Ingham* v. *Eastern Air Lines, Inc.*, 373 F. 2d 227, 239 (C.A. 2).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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